

**MOHAMED BIN ABDUL RAHMAN v.
PENDAKWA RAYA**

[A.Cr.J. (Syed Othman J.) July 1, 1978]

[Johore Bahru — Criminal Appeal No. 26 of 1976]

Criminal Law & Procedure — Dangerous Drugs — Possession of 0.10 gm. of heroin — Notice given by defence requiring chemist to give evidence — Chemist not present — No objection by defence — Admission of Chemist's Report — Effect of — Sentence — Possession of 0.10 gm. of heroin — Reduction of sentence — Dangerous Drugs Ordinance, 1952, s. 12(3) — Criminal Law Procedure Code (F.M.S. Cap. 6), s. 399(i)(b) — Evidence Act, 1950, s. 32.

Dangerous Drugs — Addict in possession of 0.10 gm. of heroin — Admission of Chemist's Report — Chemist not present in spite of Notice requiring his attendance — Effect of — Criminal Law Procedure Code (F.M.S. Cap. 6), s. 399(i)(b).

The appellant was found to be in a possession of a box of cigarettes; in the box was a tube of greyish substance found to contain 0.10 gm. of heroin.

The appellant was served with the Chemist's Report. His counsel gave notice under section 399(i)(b) of the Criminal Procedure Code to the prosecution requiring the presence of the Chemist at the trial. At the trial, the prosecution did not call the chemist. When the investigating officer tendered the report as evidence, the defence did not raise any objection. The question for the court's determination was whether the Chemist's Report in respect of which the prosecution had disregarded a notice under the said section 399(i) by the accused person to examine the chemist at the trial, and the defence at the trial not objecting to the report being admitted as evidence, should be excluded from consideration by a trial court.

Held: (1) the duty to see that a trial was conducted in a proper and fair manner did not lie merely on the court and the prosecution but on the defence as well. Since the admission of the report would have affected the accused, it was a matter for the defence to inform the court, particularly at the time when the report was tendered as evidence, that it wanted the chemist to be called;

(2) the inaction or silence of the defence at this juncture could only be construed as a withdrawal or waiver of the notice and that it had no objection to the report being admitted;

(3) as the facts indicated that the appellant was an addict and not a pusher, the sentence of imprisonment was set aside and a fine of \$400 in default 4 months' imprisonment was imposed.

Cases referred to:-

(1) *Chong Yik v. Public Prosecutor* [1953] M.L.J. 72.

(2) *Ng Yee v. Public Prosecutor* [1953] M.L.J. 250.

CRIMINAL APPEAL.

R.K. Menon for the appellant.

Abas bin Ismail Rowland (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The only question to be determined in this appeal is whether the chemist's report in respect of which the prosecution has disregarded a notice under section 399(i) of the Criminal Procedure Code by the accused person to examine the chemist at the trial, and the defence at the trial not objecting to the report being admitted as evidence, should be excluded from consideration by a trial court.

The appellant was charged with an offence of having been in possession of 0.10 gram of heroin, an offence punishable under section 12(3) of the Dangerous Drugs Ordinance, 1952. At the conclusion of the

A trial he was convicted and sentenced to 6 months' imprisonment.

The prosecution's evidence briefly was as follows. On June 8, 1975 a police corporal, suspicious of the appellant, stopped and searched him, and found on him a box of cigarettes; in the box was a tube containing a greyish substance, 0.21 gram in weight, which the chemist, after analysis, certified to contain 0.10 gram of heroin; the appellant was served with the chemist's report, and he engaged counsel, who then gave notice under section 399(i)(b) of the Criminal Procedure Code to the Deputy Public Prosecutor at Johor Bahru requiring the presence of the chemist at the trial; at the trial the prosecution did not call the chemist to give evidence; when the investigating officer tendered the report as evidence the defence did not raise any objection. The defence was called.

The defence in adducing its case merely showed that the notice had been duly served on the Deputy Public Prosecutor. At the close of the trial the defence submitted in effect that since the prosecution did not call the chemist in spite of the notice, the chemist's report should be excluded from consideration in determining the guilt of the appellant. The learned President rejected the submission, and says in his grounds of judgment that since the appellant did not object to the report being admitted when it was tendered, it was unfair for the defence to raise objection at the end of its case; more so when it had earlier accepted the report.

Section 399(i) of the Criminal Procedure Code reads:

"399(i) Any document purporting to be a report under the hand of any of the persons mentioned in sub-section (ii) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for any report may be given in evidence in any inquiry, trial or other proceedings under this Code unless such person or Registrar shall be required to attend as a witness —

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial;

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial."

Sub-section (ii) lists out the persons. A chemist in Government employ is one of them.

Before me, Encik Menon, for the appellant, argues in effect that when the report was tendered in evidence it was not for the defence to object to its admissibility, as it was the duty of the prosecution to inform the court whether it had complied with the requirements of section 399(i) of the Code; and whether or not objection was raised, since the defence had shown that the Deputy Public Prosecutor had not complied with the requirements, the chemist's report should have been excluded from consideration.

Encik Abas, for the respondent, submits that the proviso to the section must be construed that if the prosecution intends to use the report as evidence it needs only supply the accused person with a copy of

the report at least 10 days before the trial, and that once this has been done, the prosecution is under no duty to call the chemist to give evidence. He further submits that the absence of the chemist, in any case, was merely an irregularity curable under section 422 of the Criminal Procedure Code.

Both sides discussed *Chong Yik v. Public Prosecutor*⁽¹⁾ and *Ng Yee v. Public Prosecutor*⁽²⁾ which were appeals to the High Court.

In the first case, Storr J. held that non-supply of the report rendered it inadmissible in evidence amounting to an illegality not curable by section 422 of the Criminal Procedure Code, while in the second case, Mathews C.J. held that non-supply of the report was merely an irregularity curable by section 422 of the Criminal Procedure Code. With the utmost respect, I must confess that I feel somewhat uncomfortable in Mathews C.J.'s ruling in his judgment that the report was not inadmissible *per se*. I am inclined to agree with Storr J. that without section 399(i) of the Code, the report by itself would not be admissible in evidence as, if not for the provisions in the sub-section, the circumstances in which it could be admitted in evidence would be in accordance with section 32 of the Evidence Act, i.e. where the maker is dead or cannot be found etc., evidence in respect of which must be adduced. If the report could, indeed, be said to be admissible *per se*, then there would be no need to have section 399(i) at all. But without the section what Storr J. said stands out.

I am afraid I am not with the respondent in the submission that once the prosecution has supplied the chemist's report not less than 10 days before the trial as required by the sub-section, it can ignore a notice by the accused, and consequently by the court. In substance, the sub-section says that a report may be given in evidence in a trial unless the maker is required to attend as a witness by the court, or the accused if he gives 3 days notice, but, in any case, if the Public Prosecutor intends to use the report as evidence, he must supply a copy to the accused not less than 10 days before the trial. In my view, the proviso cannot be treated as a general exemption to the reservations expressed in the main provision. The words "in any case" appearing in the proviso are intended to subject the prosecution to the main provision, and that is, putting it shortly, the prosecution can only use the report as evidence if the court or the accused (who has to give notice) does not want to examine the maker of the report. Ordinarily, if the accused gives proper notice, the prosecution must call the maker of the report, and the prosecution must prove its case in the ordinary way.

The case here, however, presents an unusual situation. From the start of the trial both sides knew that the accused person had given notice that he required the chemist to give evidence but chose not to give any indication to the court that the notice had been given and that the chemist was not present. The court was unaware of the notice at the time. The prosecution might have been at fault for ignoring the notice. But it must be stressed that the duty to see that a trial is conducted in a proper and fair manner does not lie merely on the court and the prosecution

A but on the defence as well. Since the admission of the report would have affected the accused, it was, I would say, a matter for the defence to inform the court, particularly at the time when the report was about to be introduced as evidence, that it wanted the chemist to be called. The inaction or silence of the defence at this juncture can only be construed as a withdrawal or waiver of the notice and that it had no objection to the report being admitted. As far as I can see, in law, there is nothing to prevent the accused from withdrawing or waiving his notice at any time. For this reason, I am of the view that the learned President was right in not excluding the report when considering the case against the appellant.

B C Appeal against conviction is dismissed.

The appellant is young and a first offender. The amount of the drug recovered from him, I understand, is just enough for a smoke. The indications are that he was an addict and not a pusher. I set aside the sentence of imprisonment and, in its place, impose a fine of \$400 in default 4 months.

Order accordingly.

Solicitors: R.K. Menon & Co.

E LIM HOCK CHUAN v. LEMBAGA PENGURUS KERAJAAN TEMPATAN

[A.C.J. (Arulanandom J.) July 4, 1977]
[Penang — Civil Appeal No. 10 of 1975]

F Rating — Appeal — Assessment too high — Appeal precluded by section 7 of Rating Validation Enactment, 1976 — Municipal Ordinance (S.S. Cap. 133), ss. 62, 64(1), 68 — Rating Validation Enactment, 1976, ss. 3, 6 & 7.

The appellant, a house-owner, appealed against the decision of the respondent to amend the Assessment List under the provisions of section 64(1) of the Municipal Ordinance by increasing the annual value of the appellant's property. The appellant contended, *inter alia* that the proposed assessment was too high and the respondent had no jurisdiction to make the amendment under the said section 64(1).

G Held: dismissing the appeal, (1) in view of the provisions of sections 3, 6 and 7 of the Rating Validation Enactment 1976, however repugnant they might be because of their effect on past commissions or omissions by the Local Government authorities, the court had no alternative but to hold that an appeal against the assessment was precluded by the Enactment;

H (2) section 7 of the Act was all embracing and did not permit a challenge in the courts to any assessment imposed on any property in the State of Penang prior to the coming into force of the Enactment;

(3) in construing sections 6 and 7 the court was constrained to construe them to achieve the object of the said Enactment which was stated to be "to validate certain assessments and rates made or purporting to have been made under the provisions of the Municipal Ordinance (S.S. Cap. 133)."

Case referred to:-

I (1) *Engineering Industry Training Board v. Samuel, Talbot (Engineers), Ltd. & Anor.* [1969] 1 All E.R. 480, 482.

CIVIL APPEAL.

Lim Ewe Hock for the appellant.

Wong Sai Heng for the respondent.

Arulanandom J.: This was an appeal by the appellant, a house-owner, against the decision of the